BUREAU OF LAND MANAGEMENT
K. S. SUMMERS LIVESTOCK, INC.
v.
SPRING CREEK RANCH

IBLA 85-684 Decided February 26, 1987

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., directing a determination of grazing privileges to effect an equalization of recognized demand between two licensees pursuant to a range-line agreement.

Affirmed.

1. Grazing Permits and Licenses: Generally - Laches

A grazing licensee's right to request an adjustment of grazing privileges under a range-line agreement will not be barred by laches if the facts show that there has been no lack of diligence in asserting the claim.

2. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Apportionment of Federal Range

Where grazing licensees have executed a valid range-line agreement approved by this Department, such an agreement has generally been treated by the Department as an enforceable contract. Therefore, those terms specifically set forth in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with BLM's approval.

3. Appeals -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Appeals -- Rules of Practice: Appeals: Generally

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be

> entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

APPEARANCES: David K. Grayson, Esq., Office of the Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; Craig C. Halls, Blanding, Utah, for Spring Creek Ranch; Milton A. Oman, Esq., Salt Lake City, Utah, for K. S. Summers Livestock, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Bureau of Land Management (BLM) and K. S. Summers Livestock, Inc. (Summers), appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dated May 16, 1985, directing a determination of grazing privileges by the District Manager to effect an equalization of the recognized demand between appellant Summers and Spring Creek Ranch (Spring Creek) pursuant to a 1946 range-line agreement between the predecessors in interest of these licensees. Judge Rampton's decision set aside the decision of the Moab District Manager which denied Spring Creek's application for grazing use in the Big Indian Allotment, an area for grazing granted to Summers' predecessors in interest by the 1946 agreement.

In the early 1940's Daryle Redd, John Perkins, and G. J. Nielson had acquired, and were making common use of grazing lands in Unit 1 in Dry Valley, Utah, known as the Big Indian Allotment. In 1946 all of the parties became interested in separating their cattle and sheep operations. On November 12, 1946, they met at the BLM office in Monticello, Utah, and drew up an agreement to separate the Big Indian Allotment, into the Big Indian Rock Allotment, to be used by Redd, and the Big Indian Allotment to be used by Perkins and Nielson. This agreement, by its terms, stated that the division was made after a compilation of demand as against range in order to obtain an equal division.

Paragraph 5 of the agreement provides:

> These allotments will stand as a mutual agreement as a fair division of range among parties mentioned and also these lines for all parties will stand until such time as a study determines the allotments to not fairly represent the proportion of range each party is entitled to on a demand-forage basis.

In 1946 the total acreage in both allotments was computed to be 12,615 acres with 6,685 acres or 53 percent in the Big Indian Allotment and 5,930 acres or 47 percent in the Big Indian Rock Allotment (Exh. 6). Redd had 895 animal unit months (AUM's) plus 341 AUM's acquired by leasing the Richey property, for a total of 1,236 AUM's in the Big Indian Rock Allotment (Tr. 80). Perkins had 575 AUM's and Nielson had 525 AUM's for a combined total of 1,100 AUM's in the Big Indian Allotment (Tr. 81). In 1948, Redd transferred his 895 AUM's to Julius Bailey (Tr. 84) whose successor in interest is Spring Creek.

This was 341 AUM's less than the 1,236 Redd had in 1946, because his lease on the Richey property had expired and not been renewed (Tr. 84). Summers subsequently acquired the Richey base lands and the AUM's connected with it. Summers also made other acquisitions thereby increasing its grazing privileges. Currently, there are 810 AUM's allocated to Summers in the Big Indian Allotment and 895 AUM's allocated to Spring Creek in the Big Indian Rock Allotment (Tr. 84, 85).

Events leading to this appeal were summarized by Judge Rampton as follows:

> In 1964 the BLM conducted the first range survey in the Dry Valley area which resulted in a determination that the Federal range in the Big Indian Allotment was 3,268 acres with a carrying capacity of 618 AUMs and the Big Indian Rock Allotment had 1,267 Federal range with a carrying capacity of 112 AUMs. It could not be determined whether useable forage acreage was determined for sheep or cattle use or both (Tr. 88, 89).
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> After this study was made, showing a wide disparity between the available forage in the two allotments, Mr. Max Bailey requested in writing on June 12, 1965, a revision of the boundary line established by the 1946 agreement. He made the same request again in 1965, but there is no record of any response by the BLM to either request.
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> In 1977, because of drought conditions and other problems on the range, the Big Indian Rock Allotment was closed to grazing with Mr. Bailey's consent. During this time he again wrote several letters requesting resolution of the dispute and requested grazing outside the Indian Rock Allotment in the disputed areas. Again there is no record of a BLM response.
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> In 1978 Max Bailey requested the BLM conduct another range survey for the purpose of determining a boundary adjustment pursuant to the clause of the 1946 agreement. The BLM's response was that his request would be considered and that the BLM would make a new boundary determination based on a range survey, unless unforeseen events prevented the completion (Apps. Ex. 5).
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> In 1977, a MFP [Management Framework Plan] was implemented recommending that the Big Indian and Indian Rock Allotments be combined (Apps. Ex. 4). As a basis for the MFP, a range survey (forage production inventory) was conducted in 1978.
>
> The survey showed a production acreage of approximately 4,100 Federal range in the Big Indian Allotment with an average of 9 acres per AUM for a total available forage of 460 AUMs.

> It showed an approximate acreage of 1,220 Federal range in the Big Indian Rock allotment with an average of 14 acres per AUM for a total available forage of 85 AUMs (Tr. 98, 99).
>
> The MFP is currently considered an existing or current document; however, the recommendations made have been held in abeyance based on the BLM's feeling that any other changes in the allotments were superseded by a lawsuit brought by the Natural Resources Defense Counsel [NRDC] which resulted in a ruling that no new allotment management plans would be prepared prior to completion of an EIS. An EIS is now being prepared and is expected to be completed in 1986.
>
> Mr. Bailey again requested that the recommendations of the study be implemented, but he was informed that in order to bring the matter to a head he would have to request grazing on the Big Indian Allotment.

(Decision at 4-5).

On March 23, 1982, Bailey filed an application for 100-percent Federal range, active use grazing privileges for 60 cattle in the Big Indian Allotment for the period from December 1, 1982, to March 31, 1983. In a decision dated April 30, 1982, the District Manager, Moab District, denied his application, stating two reasons for denial: (1) Additional use in the Big Indian Allotment would disrupt the grazing operation in that allotment and is inconsistent with section 3, of the Taylor Grazing Act; and (2) all forage in the Big Indian Allotment has been allocated to Summers, in a combination of active and nonuse grazing in accordance with 43 CFR 4130.2(b).

Spring Creek appealed this decision primarily on the basis that it was in violation of the agreement between the predecessors in interest to Spring Creek and Summers, which had divided the range into equal allotments according to carrying capacity and the qualified range demand of the parties.

A hearing was held on May 1, 1984. In his decision dated May 16, 1985, Judge Rampton found the cooperative agreement was a valid enforceable contract between the two parties; the parties intended the division of the Federal range to be equal; paragraph 5 of the cooperative agreement indicated the division would stand until such time as a study determines that the allotments do not fairly represent the proportion of range each is entitled to on a demand forage basis; and the parties to a contract are presumed to have intended to bind their assignees.

Judge Rampton also found that under the Taylor Grazing Act, as amended, 43 U.S.C. § 315(a) (1982), BLM has a duty to protect the grazing privileges of all users. He stated that those privileges cannot be reduced without a decision, and BLM has made no such decision in this case. The Judge referred to 43 CFR 4115.2-1(e)(13)(i) which provides:

> No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualification of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

Judge Rampton noted this regulation was not in effect at the time the agreement was entered into and has been eliminated since the publication of the 1978 CFR's. Further, he states that this regulation is inapplicable because there has been no readjudication, reassessment, or action by BLM with an opportunity for a hearing. The Judge attributed any undue delay in resolving the apparent inequities to BLM, who took no action after the first survey. He found a recognizably inequitable division of range between the two parties having approximately equal range demand but unequal allocations of forage and that this inequity has continued nearly 40 years.

The Judge set aside the District Manager's decision finding it to be arbitrary and an abrogation of BLM's duty to protect the interests of Spring Creek's recognized grazing privileges. He ordered that the case be remanded for a determination by the District Manager which effects an equalization of the recognized demand between Summers and Spring Creek, either through a boundary adjustment or by allowance of Spring Creek's use in the Big Indian Allotment, even though the action may result in a commensurate reduction in Summers' licensed use.

In its statement of reasons on appeal from Judge Rampton's decision, BLM contends that 1946 agreement is ambiguous regarding what the signers intended if either party were to graze cattle rather than sheep, or vice versa. 1/ BLM asserts that it is not clear that a 50-50 split in AUM's was intended. BLM points out that the available number of AUM's had been affected by the fact that the Richey property is now grazed by Summers rather than Spring Creek and that Summers has expended a great deal of money in improving its part of the range.

BLM asserts that 43 CFR 4115.2-1(e)(13)(i) was clearly applicable to Spring Creek's case and would have precluded an appeal at any time. BLM states that the fact that a statute of limitations has been repealed does not serve to resurrect claims which failed to meet the statute while it was in effect. BLM also contends that appellant has not been diligent in pursuing what it considers to be an equitable readjustment of the allotments involved, and has allowed others to profit from its inaction. Therefore, BLM concludes that the doctrine of laches is applicable. BLM states that any adjustment in

1/ See 43 CFR 4100.0-5, however. An AUM is the amount of forage necessary to feed one cow or its equivalent for 1 month. At the time of the 1946 agreement, one cow equaled five sheep.

these allotments should be done through the National Environmental Policy Act (NEPA) process instituted in settlement of the NRDC lawsuit.

In its statement of reasons Summers argues it would be most difficult to determine the forage situation in 1946 in light of all the changes which have taken place on the two allotments since that date. These changes include Spring Creek's change from sheep to cattle operation, acquisition of additional grazing rights and range improvements undertaken by Summers.

Summers states it would be impossible for Spring Creek's cattle to graze on the public lands surrounding Summers' patented lands without making continuous and incidental grazing use of its patented lands, as there are no fences separating the two.

Summers notes that the 1946 agreement contained no provision that the agreement bind the successors and assigns of the signators. However, it agrees that the agreement describes substantially the range lands BLM studies determined to be the area for the exclusive use of Summers and its successors.

Summers claims Spring Creek has unreasonably delayed in bringing its claim and, as a result, Summers has been prejudiced because of the large expenditures it has made in reliance upon the existing allotment boundaries. Summers explains that if the lands are awarded to Spring Creek, Spring Creek would reap the benefits of Summers' investment.

In response to the statements of reasons, Spring Creek agrees with the Judge's decision. Spring Creek emphasizes that the issue involved is a contractual one of whether there was a valid range-line agreement and whether it should be honored. Spring Creek disagrees with Summers' contention that the use of Big Indian Allotment had been adjudicated and the properties had been allotted to Summers. Spring Creek points out that there had never been an adjudication recognized by all permittees or in which Daryle Redd or his successors in interest were even invited to participate. Spring Creek supports Judge Rampton's conclusion that the time limitation in 43 CFR 4115.2-1(e)(13)(i) is not applicable and that the doctrine of laches is inappropriate.

[1] We agree with Judge Rampton's finding that appellants' claim of laches is not applicable. Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. Lathan v. Brinegar, 506 F.2d 677, 691-692 (9th Cir. 1974), citing Costello v. United States, 365 U.S. 265, 282, 81 S. Ct. 534, 543 (1961). An essential part of the diligence requirement is proof of knowledge of a legal right, assertion of which is delayed. Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). Paragraph 5 of the agreement specifies that the allotments set forth in that agreement will remain in effect "until such time as a study determines the allotments to not fairly represent the proportion of range to which each party is entitled." (Emphasis added.) Thus, paragraph 5 could not have been invoked until the 1964 range survey was completed. Spring Creek's obligation to act commenced

when it acquired knowledge of the completion of the range survey. The record shows that Spring Creek wrote BLM on June 12, 1965, requesting a revision of the boundary line established by the 1946 agreement. Therefore, because Spring Creek acted within a reasonable time after ascertaining full knowledge of the situation, we find that the doctrine of laches is not applicable in this situation.

Spring Creek is not barred in asserting its claim for additional grazing privileges by 43 CFR 4115.2-1(e)(13)(i). That regulation refers to a readjudication of any license or permit where qualifications or allotment has been recognized and license or permit has issued for a period of at least 3 consecutive years immediately preceding the claim. The evidence presented indicates that Spring Creek's grazing privileges have never been reduced to less than 895 AUM's (Tr. 84, 86). Therefore there is no "readjudication" involved here as intended by this regulation. Cf. A. D. Findley, 29 IBLA 262 (1977); Phil J. Hillberry, 24 IBLA 283 (1976).

[2, 3] The main issue for consideration is whether the grazing privileges of Spring Creek and Summers should be adjusted pursuant to paragraph 5 of the range-line agreement. The characteristics and effects of range-line agreements were set forth in Evart Jensen, 5 IBLA 96, 99 (1972), as follows:

> Generally, valid range-line or allotment boundary agreements have been treated by the Department as enforceable contracts. They are entered into by two or more parties and the mutual promises of the parties to abide by the terms of the agreements and thus waive their rights to ask for a change in the line or boundary thus established constitutes ample consideration to support a contract. Mrs. Dulcie S. Williams, I.G.D. 280 (1942).

See also Bureau of Land Management v. Wagon Wheel Ranch, Inc., 62 IBLA 55, 66 (1982). Those items specifically spelled out in the agreement, which are unmistakably clear, are binding upon the parties unless changed by their mutual consent with BLM's approval. Bureau of Land Management v. Wagon Wheel Ranch, supra at 66; Evart Jensen, supra at 99. BLM considered the 1946 agreement to be a range-line agreement, embraced the provisions of the agreement, and treated the agreement as a division of the range lands (Tr. 87). Summers testified that he did not consider paragraph 5 of the agreement binding on him (Tr. 163). However, he has conformed his operation to the 1946 agreement insofar as the boundaries in the agreement coincide with the boundaries set by BLM (Tr. 157-58). We find that the 1946 agreement is a valid range-line agreement and that the terms of this agreement, including paragraph 5, are binding on Spring Creek and Summers and must be honored.

Paragraph 5 of the agreement specifies that the lines dividing the range "will stand until such time as a study determines the allotments to not fairly represent the proportion of range each party is entitled to on a demand-forage basis." In 1946, the total acreage in both allotments was 12,615 acres, with 6,685 acres or 53 percent in the Big Indian Allotment and 5,930 acres of 47 percent in the Big Indian Rock Allotment. The facts show

that in 1946 Redd had 895 AUM's plus 341 AUM's acquired through leasing the Richey property for a total of 1,236 AUM's in the Big Indian Rock Allotment. Perkins and Nielson had a combined total of 1,100 AUM's in the Big Indian Allotment.

In 1946, the parties to the agreement considered this to be a fair and equitable division of the range, with a reasonably equal distribution of AUM's sufficient to meet their needs. The question before us is whether the allocation of AUM's after the 1964 survey is proportionally the same to what it was in 1946. The record shows changes have occurred, and these changes must be considered in answering this question. Subsequent to the 1946 agreement, Summers acquired the Richey property. At the time of the 1946 agreement there was a recognized 341 AUM's qualification attached to the Richey property. Presumably 341 AUM's were transferred to Summers as a result of this transaction. 2/ Therefore, because Redd lost control of the Richey allotment, he had only 895 AUM's to transfer to Bailey in 1948. Summers also acquired the use of 640 acres of patented grazing lands located in sections 15, 22, and 23, together with the use of adjacent public domain lands located to the east and north. In addition, it acquired the use of approximately 1,960 acres on the west boundary of its allotment (Tr. 127, Summers' Statement of Reasons at 8, Exh. A).

The 1964 survey showed that the Federal range in the Big Indian Allotment was 3,268 acres with a carrying capacity of 618 AUM's and the Big Indian Rock Allotment had 1,267 acres with a carrying capacity of 112 AUM's. Federal range acreage in each allotment in 1946 and 1964 and the corresponding AUM's can thus be determined. However, the record does not disclose the number of AUM's attached to the property acquired by Summers subsequent to 1946. In addition, we are uncertain of the AUM's attached to the Richey property at the time of its transfer to Summers. Without this information we are unable to determine whether the proportion of AUM's is the same after the 1964 survey as it was at the time of the 1946 agreement. Paragraph 5 of the 1946 agreement, allowing for a change in the division of Federal range, does not become effective until such time as the allotments do not fairly represent the proportion of range each party is entitled to on a demand-forage basis. In light of the fact that Summers has acquired additional property, we cannot make this determination without knowing the number of AUM's attached to the acquired property. However, Judge Rampton did not consider the resolution of these questions necessary for his decision and we agree. Judge Rampton remanded the case to BLM to effect an equalization of grazing privileges. BLM is in a position to gather the needed information and determine what additional grazing privileges Spring Creek may be entitled to in light of this information. After making a determination BLM should issue a decision setting forth any adjustments deemed necessary and the basis for making such adjustments. The decision will be appealable to the Board by any party adversely affected in accordance with 43 CFR 4.410.

2/ Nick Sandberg testified that he was not certain as to the number of AUM's transferred to Summers when he acquired the Richey property. Sandberg indicated that there may have been some changes in the AUM's during the period prior to the transfer (Tr. 126).

We note that equalization of grazing privileges must be considered in relation to the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a - 315r (1982). Implementation of the Taylor Grazing Act is committed to the discretion of the Secretary of the Interior. Clyde L. Dorius v. BLM, 83 IBLA 29, 37 (1984); Ruskin Lines, Jr. v. Bureau of Land Management, 76 IBLA 170, 172 (1983); Chris Claridge v. Bureau of Land Management, 71 IBLA 46, 50 (1983). Section 2 of the Act charges the Secretary to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1982). The Federal Land Policy and Management Act of 1976 (FLPMA), which amended the Taylor Grazing Act, reiterates the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1982).

We recognize that the regulations allow a licensee to graze no more livestock than there is forage to adequately feed. Therefore, any adjustment to the respective grazing privileges must take into consideration the existing forage conditions. See Ray Pershall, 80 IBLA 168 (1984). Any action taken by BLM must also be in conformance with the settlement approved by the court in Natural Resources Defense Council, Inc. v. Morton, Civ. No. 1983-73 (D.D.C. June 18, 1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed and the case is remanded to BLM for action consistent with this decision.

R. W. Mullen
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

John H. Kelly
Administrative Judge